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Nos. 82-1186 and 82-1465

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC., PETITIONER,

v.

FRANKLIN MINT CORPORATION, ET AL.

FRANKLIN MINT CORPORATION, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

The United States will address the following question:

Whether recent international monetary developments and the repeal in 1978 of the Par Value Modification Act, former 31 U.S.C. 449, render unenforceable in United States courts the limitation on carrier liability, stated in terms of quantities of gold, prescribed by Article 22 of the 1929 Warsaw Convention on international air transportation.

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INTEREST OF THE UNITED STATES

These cases present a substantial question of recurring importance respecting the enforceability in United States courts of key provisions of the Warsaw Convention on international air transportation.[1] The Warsaw Convention

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*See page 27 note 23, *infra*.

[1] This treaty, universally known simply as the "Warsaw Convention" is more properly the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted at 49 U.S.C. 1502 note. The United States has been a party to the Warsaw Convention since 1934.

creates a uniform regime to govern the international carriage of passengers, baggage and cargo by air, including rules governing tickets, baggage checks and air waybills, and regulates the liabilities of carriers. Generally speaking, under Articles 18-21 of the Convention, carriers are presumptively liable for the loss of shipped goods. As quid pro quo for this rule favoring shippers, the Convention imposes a monetary limit on the liabilities of carriers. Article 22(2) of the Convention provides in pertinent part:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of value at delivery and has paid a supplementary sum if the case so requires. * * *

Article 22(4) provides that the currency unit employed in the Convention "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths." This unit is generally known as the Poincare franc.

The court of appeals has declared unenforceable the limitation on liability for loss of, or damage to, goods shipped by air in international commerce subject to the Warsaw Convention. This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of the United States generally. The United States continues to regard the Warsaw Convention as a binding international agreement. See U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Indeed, under the terms of the Convention, if the United States wished to terminate its participation in the system established by the Convention, it would be obliged to give its treaty partners six months' notice of that intention. Article 39(2). The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry.

The Department of State has informed us that several foreign governments have expressed their view that the

court of appeals' decision will seriously affect the United States' relations in international aviation. Pursuant to the United States' obligations under the Convention itself, and under the generally recognized principle of international law, *pacta sunt servanda* ("treaty obligations must be observed"), the United States is required to uphold the Convention's enforceability. Absent a decision by the political branches of the government to abrogate a treaty, by formal executive denunciation or clear legislative mandate, the courts should not take the extraordinary step of dishonoring this Nation's treaty commitments. Thus, the United States has a strong interest in challenging the court of appeals' declaration that the Convention liability limit is no longer valid.

STATEMENT

1. Franklin Mint Corp. brought this action in the United States District Court for the Southern District of New York to recover damages from Trans World Airlines, Inc. for the loss of a shipment of 714 pounds of numismatic material that was carried by TWA from New York to London. The freight charge for the shipment was $544.96. Although Franklin Mint subsequently claimed that the coins were worth $250,000, it did not make any special declaration of value when they were shipped, as it was permitted to do by the Warsaw Convention. The parties stipulated that the action was governed by the Warsaw Convention and that TWA was liable for the loss (Pet. App. A3-A4).[2]

TWA moved for partial summary judgment, asserting that under Article 22 of the Warsaw Convention its liability should be limited to the equivalent of 250 francs per kilogram of cargo weight and that each franc was to be evaluated as "65½ milligrams of gold at the standard of fineness of nine hundred thousandths." The parties were in agreement as to the applicability of the limit on liability prescribed by Article 22 of the Convention and the weight of the shipment. The only dispute concerned the rate at which

[2] Unless otherwise specified, "Pet. App." denotes the appendix to the petition for a writ of certiorari in No. 82-1186.

the liability limitation, stated in Article 22 of the Convention in terms of gold francs of a specified weight, was to be translated into dollars.[3] Franklin Mint argued that its recovery should be converted into dollars through the use of the free market commodity price of gold. TWA proposed, instead, that damages be computed by use of one of three other conversion measures: (1) the official price of gold ($42.22 per troy ounce) that prevailed under the Par Value Modification Act, former 31 U.S.C. 449, prior to its repeal,[4]

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[3] The parties apparently agreed that the actual value of the shipment exceeded the limitation rate (however it was pegged); accordingly, no question was presented respecting the actual value of the shipment.

[4] In 1945, the United States and other countries, in accepting membership in the International Monetary Fund, undertook to maintain a "par value" for their currencies, expressed in terms of gold, and to convert foreign official holdings of their currencies into gold or the currency of the holder, at the request of the holder. See Bretton Woods Agreements Act, ch. 339, 59 Stat. 512; Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501. In practice, most countries maintained a par value for their currencies by official intervention in the foreign exchange market (*i.e.*, by buying and selling their currencies against dollars, in order to keep currency exchange rates within narrow margins). The United States met its par value obligations by undertaking freely to buy and sell gold in exchange for officially held balances of dollars at the official price of gold—the dollar's par value. The dollar, at the fixed par value of $35 per troy ounce of gold, was thus the unit of account for par values of the international monetary system.

The Bretton Woods system ultimately proved insufficiently flexible to accommodate major changes in the world economy and, in particular, shifts in the economic position of the United States relative to other major countries. Consequently, in August 1971, the United States suspended convertibility of foreign official holdings of dollars into gold as the initial step in a major realignment of exchange rates and reform of the international monetary system. Realignments of exchange rates occurred in December 1971 and February 1973. Concomitant changes in the par value of the dollar were approved by Congress. Par Value Modification Act, Pub. L. No. 92-268, Section 2, 86 Stat. 116, as amended by Pub. L. No. 93-110, Section 1, 87 Stat. 352. In 1973, however, after the second major realignment of exchange rates, in response to severe market pressures, many nations moved to "floating" exchange rates. In 1976 the IMF nations agreed in the Jamaica Accords to amend the IMF Articles to relieve the United States and

(2) a price adjusted by reference to the value of the Special Drawing Rights (SDRs) established under the auspices of the International Monetary Fund,[5] or (3) the exchange value of the contemporary French franc. If either the last official price of gold or the SDR-based method for conversion were employed, TWA's liability in this case would be limited to roughly $6500. The use of the contemporary French franc would yield a somewhat larger recovery,

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other IMF members of the obligation to maintain a fixed par value for their currencies and to adopt the Special Drawing Right (SDR) as the unit of account of the IMF. See note 5, *infra*. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. The Second Amendment took effect on April 1, 1978. This amendment was accepted by Congress in 1976. Pub. L. No. 94-564, 90 Stat. 2660. By the same legislation, the Par Value Modification Act, which had fixed the par value of the dollar, was repealed effective April 1, 1978. See pages 16-20, *infra*.

[5] Under this proposal, TWA's liability would be the dollar value, on the date of loss, of that number of SDRs which had, on March 31, 1978, a value equivalent to the limitation rate, stated in gold, by the Convention.

SDRs are international reserve assets allocated to member countries by the International Monetary Fund to supplement existing reserve assets. They also serve today as the IMF unit of account. At the time the original Articles of Agreement of the IMF became effective in 1945, the dollar, at the fixed par value of $35 per troy ounce of gold, was the IMF unit of account. See note 4, *supra*. The SDR was created by the IMF nations in 1969. First Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748. The SDR was then defined in terms of gold and was originally equal in value to the dollar. On June 30, 1974, the value of one SDR was $1.20635, a figure that reflected the two intervening devaluations of the dollar (see note 4, *supra*).

In July 1974, after the advent of floating exchange rates (see note 4, *supra*), the SDR was assigned the value of the sum of specified amounts of a number of currencies. Under the Second Amendment of the IMF Articles of Agreement, effective in 1978, the SDR's value is determined daily on the basis of the market exchange rate for specified amounts (a mixed "basket") of a number of major national currencies. Although the United States dollar is a major component of the basket, the value of the dollar in terms of the SDR varies over time, depending upon changes in exchange rates for the various currencies in the "basket." Under the 1978 Amendment to the IMF Articles of Agreement, the SDR no longer has any fixed relationship to gold.

while conversion at the prevailing free market price would produce a recovery many times greater, but still significantly less than the actual value now claimed for the shipment (Pet. App. A4-A6).[6]

The district court stated: "[w]ere we writing on a clean slate we would find the arguments in favor of * * * [the SDR] most persuasive" (Pet. App. A27). It concluded, however, that the dollar amount of the liability limit should be calculated by reference to the former official price of gold fixed by the Par Value Modification Act. *Ibid.* The court observed that this measure remained the basis for the liability limitations stated in dollars in international air tariffs filed with the Civil Aeronautics Board. The court thought deference was due to these tariffs, reasoning that they "come[ ] as close as anything to constituting a governmental interpretation of the Article 22 limitation." *Ibid.* Accordingly, Franklin Mint was awarded damages at the rate of $9.07 per pound on its lost shipment, a total of $6,475.98, plus interest and costs (*id.* at A28).[7]

2. The court of appeals affirmed "the result reached in this case" (Pet. App. A3), adopting the district court's reasoning and citing the reliance interests of the parties (*id.* at A19). Although that disposition was sufficient to resolve the dispute between TWA and Franklin Mint and is the only ruling reflected in the court of appeals' formal judgment,[8] the court proceeded to "hold the Convention's limit on liability prospectively unenforceable in United States

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[6] We are unaware of any basis for the court of appeals' passing comment (Pet. App. A13) that one of the alternative conversion measures would have resulted in a limit on liability in excess of $400,000.

[7] When gold is valued at the rate of $42.22 per troy ounce, $9.07 per pound of cargo is the mathematical equivalent of the Article 22 rate of 250 francs, each consisting of 65½ milligrams of gold of the fineness of nine hundred thousandths, per kilogram of cargo.

[8] The judgment of the court of appeals states simply that "the judgment of the District Court * * * is affirmed in accordance with the opinion of this court" and that costs were to be taxed against Franklin Mint (82-1465 Pet. App. A24).

courts" (*id.* at A3).[9] The court entered this ruling believing that "neither international nor domestic sources of law specify a unit of account for purposes of the Convention" (*id.* at A17). In particular, the court of appeals understood the repeal of the Par Value Modification Act to preclude reference, for purposes of enforcing the Convention, to the price of gold set by that Act (*id.* at A14):

> The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of $42.22 per troy ounce was no longer recognized by the United States. We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value.

The court of appeals found each of the alternative conversion mechanisms proposed by the parties to be unacceptable. The court regarded use of either the modern French franc or the free market commodity price of gold as inconsistent with the intent of the contracting nations to establish a non-parochial, internationally-recognized, uniform and stable measure for the liability limitation under the Convention (Pet. App. A15). Use of the SDR as the basis for conversion was, in the court's view, simply unauthorized by the Convention. The court of appeals suggested that it was precluded from adopting a unit of conversion "variable at the whim of an international body distinct from

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[9] No party had urged that conclusion upon the court of appeals; neither had the court provided the parties or the United States any opportunity to address the issue. Cf. 28 U.S.C. 2403; *Verlinden B.V.* v. *Central Bank of Nigeria*, No. 81-920 (May 23, 1983), slip op. 5 n.8.

the parties to the Convention" (*id.* at A17). The court also believed that use of the SDR would have required it to determine the number of SDRs to be awarded per kilogram of freight loss—and thus to legislate the level of limitation (*ibid.*).

Thus, the court of appeals concluded that an essential ingredient of the formula by which the Convention's limit on liability had, previous to 1978, been translated into United States dollars had been eliminated "as a consequence of international action followed by domestic legislation" (Pet. App. A17). As a result, the court believed that the parties were asking it "to select * * * as a matter of policy, a new unit of conversion" (*ibid.*) This, the court explained, was beyond its authority, because "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties [to the Convention]," and "such a unit must be selected either through treaty ratification by the Senate or by legislation passing both the Houses of Congress" (*id.* at A17, A18).[10]

SUMMARY OF ARGUMENT

1. It is settled that a statute should not be construed to abrogate a treaty unless Congress clearly intended that result. And it is equally well established that a treaty should be liberally construed in a manner that effectuates its purposes. The decision of the court of appeals is squarely at odds with these principles because it frustrates the basic purpose of the Article 22 liability limitation on the strength of legislation that was not intended to affect, much less to abrogate, this fundamental provision of the Warsaw Convention.

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[10] The court of appeals announced (Pet. App. A19) that its ruling would

> apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. * * * Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling.

The court's mandate has been stayed pending the final disposition of this case (Pet. App. A21-A23).

2. The court of appeals lost sight of the fact that the Warsaw Convention is intended to limit carriers' liabilities for lost or damaged cargo. In light of this central objective, the court's refusal to enforce the Convention limitation because of uncertainty as to its precise dollar equivalent is the one solution that cannot be reconciled with the treaty. By contrast, available conversion measures, while perhaps imperfect, plainly give effect to the overriding purpose of Article 22. The prevailing dollar level of the Article 22 limitation, based on the last official price of gold, is disclosed to shippers in tariffs filed with the Civil Aeronautics Board, and shippers are free under the Convention to secure added protection for their cargo by making a timely special declaration of value. It accordingly is most equitable and most consistent with the Convention scheme to enforce the limitation on liability according to the best available measure of its dollar value, notwithstanding technical quibbles as to whether it precisely reflects the level embodied in the Convention.

3. a. The court of appeals greatly exaggerated the difficulty of determining a dollar value for the Article 22 liability limit that gives effect to the purposes underlying the Warsaw Convention. Repeal of the Par Value Modification Act did not render the gold price of $42.22 per troy ounce unavailable for this discrete purpose. Rather, the repeal was merely a domestic legislative response to developments in international currency arrangements unrelated to the Warsaw Convention. Indeed, the reason for the changes in the international currency regime—to establish needed additional currency *flexibility* and liquidity—has no application to the liability limit of the Convention, which was stated in terms selected to yield *stable* and predictable results. Moreover, the changes in the IMF Agreement and the domestic legislation enacted in response do not suggest that the last official price of gold was considered too high or too low for *Convention* purposes. Accordingly, there is no reason why the value of $42.22 per troy ounce of gold, which yields a liability limitation of $9.07 per pound of cargo, should not continue to be applied to implement the Convention.

b. Borrowing the last official price of gold for the purpose of converting the Warsaw Convention's liability limitation into dollars does not represent a novel or improper exercise in judicial legislation. On the contrary, courts regularly employ rough and ready approximations in order to compute damages and borrow analogous state or federal rules, such as statutes of limitations, where Congress has not prescribed the rule to govern a federal cause of action. Similarly, courts frequently are called upon to construe a statute in view of an event Congress could not have anticipated, such as the holding that a portion of the statute is unconstitutional.

c. In any event, the rate of $42.22 per troy ounce of gold continues to be employed for significant domestic purposes, including the valuation of United States gold reserves. Thus, Congress has not precluded the use of that dollar rate for all purposes, and it remains available to implement the Warsaw Convention.

4. Use of either the modern French franc or the free market price of gold as the conversion measure for the Article 22 limit on liability sharply conflicts with the original intent of the Warsaw Convention nations. On the other hand, the remaining alternative, based on the SDR, yields a dollar rate virtually identical to the rate based upon the Par Value Modification Act. While the use of the SDR rate would, in our view, be less desirable than use of the gold price of $42.22 per troy ounce, the convergence of the two measures strongly suggests that the resulting value effectuates the intent of the Convention to provide a stable limitation on the liabilities of international air carriers for loss or damage to cargo.

ARGUMENT

THE WARSAW CONVENTION LIMITATION ON CARRIER LIABILITY FOR LOST OR DAMAGED GOODS REMAINS ENFORCEABLE

The court of appeals' declaration that the Warsaw Convention limitation on carrier liability for lost or damaged goods is henceforth unenforceable in United States courts undermines a significant regime of international law to which the United States is committed and threatens to sub-

ject this country to adverse repercussions in the international arena. Because this declaration is inconsistent with established principles regarding the validity and enforceability of treaties, the court of appeals' analysis should be rejected.

1. The principles that govern this case are well settled. "[A] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook* v. *United States*, 288 U.S. 102, 120 (1933). See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). When considering questions that arise under a treaty, courts are directed to

> construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

Bacardi Corp. v. *Domenech*, 311 U.S. 150, 163 (1940). Courts must give a treaty "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purposes." *Wright* v. *Henkel*, 190 U.S. 40, 57-58 (1903). Finally, the provisions of a subsisting international agreement are not rendered inapplicable by the occurrence of events that were unforeseen by the nations that are party to the instrument. See, *e.g.*, *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, *supra*, 291 U.S. at 157.

In light of these principles, the court of appeals should have engaged in a two-step analysis. First, it should have determined whether Congress clearly intended to invalidate the liability limit of the Warsaw Convention. We submit that the requsite specific and unambiguous intent cannot be found here (see pages 16-20, *infra*). Second, upon concluding that the Convention remains in force, the court should have construed its language in the light of pertinent statutes, governmental policies, and economic facts, to ac-

complish its obvious purpose. As we explain below (pages 15-27), it was not beyond the court of appeals' competence to ascertain a serviceable dollar rate for the Convention's limitation on liability.

2.a. The court of appeals' decision diverges from the correct analysis. The court failed to give effect to the intent of the nations that entered into the Warsaw Convention, principally because it ignored the most significant aspect of their purpose. In limiting liability and in specifying that limit in terms of the "Poincare" franc (consisting of a stated quantity of gold of a prescribed level of purity), the contracting nations intended to establish an internationally uniform and stable standard, and above all to impose a *limit* on air carrier liability. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). The treaty regime represented a compromise between the interests of transport users and carriers that took into account the disparate positions of the various nations party to the Convention. Transport users obtained a fixed system of nearly-absolute liability, and an opportunity to provide themselves with additional protection by declaring excess value at the time of shipment. In return, carriers received a fixed and certain standard of liability and the limitation on recovery at issue in this case. *Id.* at 499-500.[11] Moreover, the Convention reduced conflicts of laws problems, involving differing standards of fault, to the advantage of all.

The court of appeals proceeded as if Article 22 of the Warsaw Convention were a prescription for liquidated damages intended to fix the exact amount of carrier liability in every case, rather than a bar only to awards of damages that are too high (see Pet. App. A14). In the court's view, if it could not translate the gold-based liability limit fixed by the Convention into dollars at a rate uniquely determined by the Convention, it was powerless to give any effect at all to Article 22 (*id.* at A5, A17). The court of ap-

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[11] Transport users probably received the benefit of lower rates made possible by the limitation on liability, which reduced the carriers' insurance costs.

peals thus ignored entirely the most critical facet of the intentions of the contracting parties—the unambiguous intent to adopt a ceiling on damages for loss of shipped goods. The court instead substituted a regime of completely unbounded liability.

Complete abrogation of the limitation on liability—the solution decreed for the future by the court of appeals—is the one alternative that simply cannot be squared with the provisions of Article 22. Instead, the court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers. The court was not free to abdicate that responsibility simply because it concluded that no ideal measure of conversion was available. In giving effect to a legislative instrument "it is better to be roughly right than totally wrong" (*Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 6 (Marshall, J., dissenting)). As explained above, this observation applies with heightened force in the special context of international agreements. The court of appeals' announced intention to refuse to enforce any limitation on liability for losses in the carriage of goods subject to the Warsaw Convention accordingly was in clearest violation of the mandate of the Convention.

b. The appropriateness of employing the best available conversion mechanism and enforcing the resulting dollar rate for the Article 22 limitation on liability is underscored by interrelated provisions of the Convention. Hand-in-glove with the cargo liability limitation is the provision of Article 22(2) that gives a shipper the right to assure itself of recourse for the full value of its cargo by formally declaring its extra value "at the time when the package [i]s handed over to the carrier" and paying "a supplementary sum if the case so requires." See page 2, *supra*. By contrast, Article 23 of the Convention nullifies "[a]ny provision tending to relieve [a] carrier of liability or to fix a lower limit than that which is laid down in this convention." The effect of the court of appeals' declaration is, of course, to relieve shippers seeking extra protection for their cargo of the obliga-

tion to make the timely declaration of value required by the Convention, as well as the obligation to pay a supplementary tariff based upon the value attached to the cargo by the shipper.[12]

Because the Convention prescribes in some detail a procedure by which shippers may avoid the Article 22 liability limitation, a ruling that provides the benefits of that course to those who do not properly avail themselves of it is faithless to the United States' obligation to adhere to the Convention. The availability within the Convention regime of a means of avoiding the Article 22(2) limitation on liability also suggests that difficulty in identifying a uniquely correct dollar rate for the Article 22 limit is no basis for setting aside that limit. And because the Convention denies carriers any means to limit their liability *below* the Convention rate, it is most consistent with the Convention regime to impose upon shippers whatever marginal burden may flow from the possibility that the computation of damages at a dollar rate based upon the best available conversion mechanism will not attain some theoretical ideal of precision.[13]

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[12] Substantial inequities and inefficiency may result from the disruption of the balance struck in Article 22(2) because of the possibility that the value of a shipment may—as in this case involving a shipment of coins—be wholly disproportionate to its weight. It is possible, of course, that carriers will be able to defray the enhanced liabilities they will incur under the unbounded liability regime by raising their tariffs, as the court of appeals seems to have invited them to do (see Pet. App. A19-A20). But the result could be to foster relatively indiscriminate tariff increases, rather than adjustment of tariffs to the special values assigned to goods by shippers, a procedure that the Convention regime facilitates.

[13] Shippers are not left in the dark as to the liability limit applicable to their claims. All international carriers subject to the Convention that operate subject to the jurisdiction of the Civil Aeronautics Board have filed tariffs, computed on the basis of the last official price of gold, reflecting the liability limitation of $9.07 per pound or roughly $20.00 per kilogram. See Pet. App. A27. TWA's reliance upon this measure of its liability accordingly should have come as no surprise to Franklin Mint. Similarly, absent action by the CAB to disallow tariffs incorporating this limit on liability, shippers will continue to be on notice of the prevailing liability limit. Of course, even if the court of ap-

3. The court of appeals did not purport to hold that Congress intended to abrogate the Convention's cargo liability limitation; indeed, the court below recognized that "the Convention has not been formally abrogated" (Pet. App. A6). This conclusion is plainly correct. As we explain below (pages 16-20), neither the adjustments to the international currency system effective in 1978, nor the repeal of the Par Value Modification Act that reflects the United States' acquiescence in those changes, were directed at the Warsaw Convention or any of its provisions. Yet, the court of appeals thought itself unable—at least for the future—to enforce the liability limitation because, in its view, "[e]very proffered solution * * * appears to have a devastating argument against it" (*ibid.*).

The court of appeals substantially exaggerated the obstacles to ascertainment of an acceptable measure of conversion.[14] Specifically, the court's reasons for rejecting TWA's

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peals' decision is given effect, carriers may be able to enforce tariff-based limitations of their liability as conditions of the contract of carriage. It has been argued, however, the enforcement of such contractual limitations in this situation would violate Article 23 of the Convention (see page 13, *supra*). See *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983) (personal injury liability limitation of Warsaw Convention and supplemental contractual liability limitation both unenforceable), interlocutory appeal denied, No. 83-8051 (9th Cir. May 10, 1983).

[14] Although substantial changes in international currency arrangements have taken place since 1971, courts both in the United States and elsewhere have found it possible to interpret Article 22 of the Convention so as to effectuate the original intent to limit the liability of carriers thereunder. See Brief of the International Air Transport Association in Support of Certiorari 17 nn. 51 & 52. See also Pet. App. A12-A13 & nn. 14-19; J. Gold, *The Fund Agreement in the Courts: Volume II* 443-454 (1982). These decisions strongly suggest that the court of appeals could have given effect to the Convention. That other courts have not achieved complete consensus as to the proper limitation rate does not justify the court of appeals' decision simply to throw up its hands in contemplation of the task. Moreover, notwithstanding their differences, the solutions adopted by other courts that have addressed the issue have this much in common: they all give effect to the intent of the contracting nations to limit liability to a level below actual damages in a case such as this. See page 4 & note 3, *supra*.

proposal to convert the Convention liability limit into dollars at a rate of $42.22 per troy ounce of gold are unsound.

a. Contrary to the decision of the court of appeals, the repeal of the Par Value Modification Act in 1978 does not preclude use of the last official price of gold established by that Act, $42.22 per troy ounce, for translation of the gold-based liability limit prescribed by the Convention into dollars. Especially when the appropriate inquiry is made—*i.e.*, whether a particular measure of conversion acceptably effectuates the intent of the contracting nations to limit liability for cargo damages—the court of appeals' objections to use of this measure appear insubstantial.

The Warsaw Convention is a self-executing treaty that provides a source of rules of decision applicable in United States courts without requiring enactment of any supplementary implementing legislation by Congress. See, *e.g.*, *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia* v. *Pan American Airways Inc.*, 269 App. Div. 287, 55 N.Y. Supp. 317, aff'd, 295 N.Y. 852, 67 N.E.2d 256, cert. denied, 329 U.S. 741 (1946). See generally *Bacardi Corp.* v. *Domenech, supra*, 311 U.S. at 161. Neither the Par Value Modification Act, fixing the value of $42.22 per troy ounce of gold for international exchange purposes, Pub. L. No. 93-110, Section 1, 87 Stat. 352, nor any of its predecessors that fixed other prices, or authorized the President to do so,[15] can properly be regarded as enabling legislation necessary to the enforcement of the Warsaw Convention in United States courts. The effect of the various legal instruments that established the relationship of the dollar and gold over the period between 1934, when the United States adhered to the Convention, and 1978, was simply to establish a background economic fact. Accordingly, the repeal of the last of these provisions—which had been enacted and was in the end repealed for reasons

[15] See, *e.g.*, Par Value Modification Act of 1972, Pub. L. No. 92-268, Section 2, 86 Stat. 116 (fixing par value of dollar at $38 per troy ounce); Act of May 12, 1933, ch. 25, Section 43(b)(2), 48 Stat. 52 (authorizing President to fix by proclamation the weight of the gold dollar).

unrelated to the Convention—did not have the effect of rendering the Article 22 liability limitation unenforceable.

On March 31, 1978, one day before the Second Amendment of the Articles of Agreement of the International Monetary Fund took effect (see pages 4-5 note 5, *supra*), the dollar equivalent for the liability limit prescribed in Article 22 of the Warsaw Convention was a determinate quantity. Pursuant to Sections 6 and 9 of Pub. L. No. 94-564, 90 Stat. 2661, the Par Value Modification Act was repealed effective April 1, 1978, when the amendments to the IMF agreement went into effect. But none of these legal developments provides any reason why the dollar value of the liability limitation that prevailed one day earlier no longer satisfied the central intent of the parties to the Convention. There is no indication in the language or legislative history of Pub. L. No. 94-564 that repeal of the Par Value Modification Act was intended to affect, much less to abrogate, the liability limitation established by Article 22 of the Convention.

Rather, the repeal of the Par Value Modification Act was part of legislation that amended the Bretton Woods Agreement Act and accepted the Second Amendment of the Articles of Agreement of the IMF on behalf of the United States. See pages 4-5 note 5, *supra*. Amendment of these Articles was prompted by the fact that IMF member nations no longer wished to maintain par values as required under the original IMF Agreement. Accordingly, central to the amended IMF Articles of Agreement was the abolition of the requirement of par value maintenance that had been placed upon the United States and other countries by the original Bretton Woods Agreements. The Par Value Modification Act was thus repealed as part of a process of reordering of international monetary affairs. As the House Report on Pub. L. No. 94-564 explained, under the new international regime "the U.S. has no legal obligations to establish and maintain a par value for the dollar." H.R. Rep. No. 94-1284, 94th Cong., 2d Sess. 13 (1976). Congress was not abandoning a unit of conversion for all purposes; it was simply recognizing in domestic legislation that the United States had been relieved by international agreement of its

undertaking to maintain a fixed relationship between gold and dollars for intergovernmental exchange purposes.

Thus, the court of appeals was wrong in concluding that, by repealing the Par Value Modification Act, Congress "specifically rejected" (Pet. App. A14) use of the price of $42.22 per troy ounce for purposes that necessarily include implementation of Article 22 of the Warsaw Convention. There is no indication whatever that Congress intended to preclude such use.[16] Legislative silence cannot satisfy the requirement of clear expression necessary to abrogate a treaty. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); page 11, *supra*.

Nor was repeal of the Par Value Modification Act "relevant to the Convention" in the sense the court of appeals suggested, because repeal did not reflect the view that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A14). On the contrary, the repeal of the Par Value Modification Act was a domestic response to an international consensus that the par value system was no longer satisfactory—essentially because it was too rigid for the purposes of the international monetary system, not because the particular value was too high or too low. Among the factors underlying this consensus were the insufficiency of the supply of gold and the rise of a previously unknown speculative free market in gold that interfered with its use as a unit of account. See R. Lipsey & P. Steiner, *Economics* 713-725 (1978). But abandonment of gold as a unit of account between nations for purposes of the International Monetary Fund in no way suggested that the prevailing value of gold was no longer to be employed under *other* treaty regimes that *did continue* to provide for such use. This is especially so because continued use of the fixed limitation yielded by conversion at the rate of $42.22 per troy ounce of gold fulfills the purpose of the framers of the Warsaw Convention to establish a stable limitation on liability capable of uniform application. See Barlow, *Article*

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[16] The court of appeals acknowledged that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act" (Pet. App. A18).

22 of the Warsaw Convention: In a State of Limbo, 8 J. Air Law 2, 17-19 (1983). See also page 12, *supra*.

In contrast to the desire of the IMF nations for flexible currency exchange arrangements among nations, the parties to the Warsaw Convention sought fixed and predictable liability limits for lost or damaged cargo.[17] The needs of the IMF nations for flexibility in exchange rates, and to insure adequate liquidity—factors that prompted the international decision to abandon the fixed exchange rates based on a fixed par value for the dollar defined in terms of gold—simply have no application to the purposes of Article 22 of the Warsaw Convention. Moreover, while the nations party to the Warsaw Convention have proposed in the unratified Montreal Protocols to restate the Convention liability limit in terms of SDRs, they did not propose to alter

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[17] Thus, the negotiating history of the Convention reflects that the liability limit of Article 22 was stated in terms of Poincare francs in order to establish a limit insulated against the influence of unilateral national currency devaluation. The draft text of the Warsaw Convention prepared by the Comite Internationale Technique d'Experts Jurisdiques Aeriens expressed liability limitations in French francs, but stated that the "values * * * are gold values." R. Horner & D. Legrez, *Second International Conference on Private Aeronautical Law, Minutes* 265 (1975). France proposed an amendment to eliminate that qualifying phrase (*id.* at 88), but Switzerland objected to the change, on the ground that "one need have only a modification of * * * national law to overturn the essence of this provision" (*id.* at 89-90). The solution eventually chosen by the contracting nations responded to this criticism of the French proposal. While the liability limitation was nominally stated in the terms of French coinage (the Poincare franc), that unit was defined in terms of its weight and purity of gold—effectively adopting a gold standard.

We note, as a matter of economic fact, that although the exchange value of the dollar has been permitted to float against other currencies in recent years, see page 5 note 5, *supra*, this arrangement has not resulted in a de facto devaluation of the dollar. Indeed, current exchange values show that the dollar has appreciated to some degree since 1974. Thus, use of the official price of gold fixed in 1973 to compute the Convention liability limit cannot be regarded as unfair to shippers, when viewed in light of the purposes of defining the Convention liability limit in terms of the gold Poincare franc.

the actual liability levels.[18] Nor, so far as we are aware, has the government of any Convention nation objected to the use by United States courts of the limitation rate of $9.07 per pound that results from application of the gold price of $42.22 per troy ounce. In sum, the repeal of the Par Value Modification Act does not preclude resort to the price of $42.22 per troy ounce to implement the liability limitation prescribed by the Warsaw Convention. See *Maschinenfabrik Kern, A.G.* v. *Northwest Airlines, Inc.*, 562 F. Supp. 232, 239-240 (N.D. Ill. 1983) (rejecting Second Circuit's analysis in *Franklin Mint*).

The issue presented here is best understood in concrete terms rather than the abstractions favored by the court of appeals. Consider two cases arising from the loss on a given date of identical cargoes, each weighing 100 pounds, shipped in commerce subject to the Warsaw Convention. One comes to judgment on March 31, 1978, the other one day later. In the first case, it is undisputed that the carrier's liability is limited by Article 22 to $907. Our submission is simply that the result in the second case should be no different, because nothing in the repeal of the Par Value Modification Act, or in the international agreements that prompted the repeal, reflects any intention to raise, lower, or abandon the prevailing standard for computing the liability limitation. Any other result may well entail the judicial legislation that the court of appeals deemed impermissible.

b. This approach, based on the presumption that applicable legal rules remain in effect until they have been affirmatively altered by a competent authority, is consistent with the decisions of this Court. See, *e.g.*, *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 13-14; *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The result achieved harmonizes the repeal legislation with the unabrogated Convention, "constru[ing] them so as to give effect to both." *Whitney* v.

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[18] Under proposed Montreal Protocol 4, the cargo liability limitation would be set at 17 SDRs per kilogram. Based upon exchange rates prevailing in early 1983, that amount is equal to about $20 per kilogram or $9.09 per pound. See S. Exec. Rep. No. 98-1, 98th Cong., 1st Sess. 31, 42 (1983). Compare page 6 note 7, *supra*.

Robertson, 124 U.S. 190, 194 (1888). This Court has employed a similar approach in determining the effect of repeal of one statute upon another, related, statute. For instance, prior to the recent enactment of Title 31 of the United States Code into positive law, the False Claims Act, Rev. Stat. 3490 (1874), imposed civil liability upon "Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title CRIMES" of the Revised Statutes. Section 5438 of the Revised Statutes was, however, repealed in 1909. Act of Mar. 4, 1909, ch. 321, Section 341, 35 Stat. 1153. Yet, notwithstanding the explicit dependency of the civil liability provision upon its penal counterpart to define the acts for which liability was created, and the express repeal of Section 5438, the Court has treated Section 5438 as having "continued vitality * * * insofar as it specifies the acts giving rise to civil liability * * *." *United States* v. *Bornstein*, 423 U.S. 303, 307 n.1 (1976); see also *United States* v. *Neifert-White Co.*, 390 U.S. 228, 229 n.1 (1968).

The gold price fixed by the Par Value Modification Act similarly has "continuing vitality" for the discrete purpose of translating the Article 22 liability limitation rate into dollars. Indeed, this result follows a fortiori from the Court's approach to the provisions of the False Claims Act that were seemingly left in limbo by repeal of their criminal counterpart, for unlike the False Claims Act, the meaning of Article 22 of the Convention was not explicitly premised upon the repealed statutory provision. Moreover, given the close linkage between the civil and criminal provisions of the False Claims Act, it would have been far more credible to suggest that Congress must have intended to eliminate the basis for civil liability under the False Claims Act than to suggest that Congress, in 1978, meant to abrogate the Article 22 liability limit. After all, had it considered the matter, Congress surely would have recognized that some dollar value for the Convention liability limitation remained essential, so that the United States would not be in breach of its international obligations.[19]

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[19] An admittedly improbable hypothetical may highlight the point. Assume that Congress in the future determines that a new unit of cur-

By the same token, courts often are required to construe a statute in light of an unanticipated event occurring subsequent to its passage, based upon an assessment of what Congress would have intended if it could have foreseen the event. The most common example involves the determination of severability—what would Congress have enacted if it had realized that a portion of the statute it did enact was unconstitutional? Courts have not hesitated to engage in that inquiry, although it is inherently an imprecise and speculative endeavor. And, faced with the alternative of discarding legislation that is within Congress' power, the courts have sensibly preferred to give effect to the valid portions of the enactment, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not * * *." *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). See *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-14; *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976).

Courts are also authorized in other contexts to fill in gaps left in the law by Congress in a manner consistent with the controlling general legal principles and presumed to accord with unstated legislative intent. For instance, Congress frequently fails to supply a federal statute of limitations to govern federal causes of action. Yet, as the Court has recently explained:

> In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather our task is to "borrow" *the most suitable* statute or other rule of timeliness from some other source.

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rency should be adopted for the United States, but neglects to revise one or more of the provisions of Title 28 that establish a jurisdictional amount in terms of dollars. See, *e.g.*, 28 U.S.C. (& Supp. V) 1332(a), 1335(a), 1337(a), 1346(a)(2). It would be absurd to suggest that the effect would be to abolish jurisdictional requirements governing the size of claims under these statutes. It would be equally unrealistic to infer that no claim can surpass any of the jurisdictional thresholds, effectively abolishing the grants of jurisdiction. Instead, we assume that the courts would continue to seek to effectuate the intent of Congress in enacting the various jurisdictional provisions, as well as the monetary qualifications upon their scope.

DelCostello v. *Teamsters*, No. 81-2386 (June 8, 1983), slip op. 6 (emphasis added). The process of determining "the most suitable" time limit is not regarded as impermissible judicial legislation, but as "a phase of fashioning remedial details where Congress has not spoken but [has] left matters for judicial determination within the general framework of familiar legal principles." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).

The judicial inquiry in such cases is strikingly similar to the present one. In selecting a suitable statute of limitations, the courts are required to canvass colorably analogous state and federal causes of action and their limitations provisions in order to determine which of the necessarily imperfect alternatives most nearly reflects the appropriate "balance of interests." (*DelCostello* v. *Teamsters, supra*, slip op. 17). The Court emphasized in *DelCostello*, that there is no requirement that a "perfect analogy" be discovered. *Id.* at 19. And the Court rejected as "beside the point" the suggestion that borrowing was impermissible because Congress had not foreseen or intended the limitations provision borrowed to apply to the class of claims in question. Rather, it was deemed sufficient that in enacting the later provision Congress had not intended to dispense with all time limitations and that the analogous provision is "the most suitable source for borrowing to fill a gap in federal law." *Id.* at 18 n.21. By this criterion, it is plainly appropriate for the courts to consider various alternatives for translating the Convention's liability limitation into dollars, and to "borrow" the last official price of gold to give effect to the unabrogated provisions of Article 22.

Nor do this Court's cases reflect the view—seemingly held by the court of appeals—that some degree of imprecision, or the need to make rough and ready judgments or to employ convenient rules of thumb in the determination of damages, disables a court from awarding appropriate relief. Courts frequently are called upon to compute damages in the absence of clear standards. In determining the amount of "just compensation" required by the Fifth Amendment, for example, the Court has recognized that "serious practical difficulties" ordinarily dictate the use of a "relatively ob-

jective working rule"—the fair market value standard—even though it is not always identical to the idealized result required by the "indemnity principle" of the Fifth Amendment. *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 510-512 (1979). Yet it could not seriously be maintained that the assessment of just compensation therefore entails nonjusticiable matters.

Similarly, recognizing the limits of economic science, the Court has held that "delusive exactness" is not necessary in the determination of an appropriate discount rate in computing personal injury awards. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 28 (citation omitted). And in fixing damages resulting from an antitrust violation, it is established that "the fact that [the] extent of [damages] is uncertain does not prevent a recovery." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). Rather, a jury is permitted to "make a just and reasonable *estimate* of the damage based on relevant data." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (emphasis added). Thus, in order to fulfill the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (*Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976)), and to give effect to the applicable law, courts frequently find it necessary to award damages according to a standard that falls short of some idealized notion of "delusive exactness" but is sufficiently precise to fulfill legislative objectives.

c. In any event, the price of $42.22 per troy ounce of gold was not entirely without official standing under United States law after April 1, 1978. Pursuant to newly codified 31 U.S.C. 5117(b) (see Pub. L. No. 97-258, 96 Stat. 984), formerly 31 U.S.C. 405b, that value is used to govern issuance of gold certificates by the United States Treasury. And it is used to express the value of the gold reserves of the United States for general purposes. 1 *Report of the Commission on the Role of Gold in the Domestic and International Monetary System* 13 (Mar. 1982). Moreover, the rate of $42.22 per troy ounce of gold has generally been used by the United States to determine the dollar amount

of its subscription obligations to the capital stock of four major international financial institutions, the International Bank for Reconstruction and Development (the World Bank), the Inter-American Development Bank, the International Development Association, and the Asian Development Bank.[20]

The court of appeals dismissed as irrelevant to the issue presented the continued use of the $42.22 conversion rate to value gold held in the United States Treasury (Pet. App. A14 n.20). But the court of appeals failed to recognize that it was the abandonment of the $42.22 conversion rate for purposes equally unrelated to the Warsaw Convention—*i.e.*, under the IMF Articles of Agreement—that is not controlling here. The various examples cited above of continued use of the $42.22 price of gold merely illustrate that Congress did not reject use of that price for all purposes. In these circumstances, repeal of the Par Value Modification Act falls far short of a clear legislative decision to abrogate the Convention or to render the $42.22 conversion rate unavailable for use in United States courts.

4. We agree with the court of appeals' conclusion (Pet. App. A15) that use of the exchange value of the modern French franc or of the free market value of gold to translate the liability limitation specified by the Convention into dollars would be directly contrary to the intentions of the contracting nations. The former measure is precluded because the parties carefully specified a different unit—the Poincare franc consisting of a stated quantity of gold. Use of the free market price of gold is inappropriate because the parties plainly intended to adopt a relatively fixed value unaffected by the extreme fluctuations that have recently beset the free market in unmonetized gold—a market unknown at the time the Convention entered into force. These fluctuations have no place in the liability limitation regime of the Convention. See Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. of Mar. L. & Com. 645 (1974). Moreover,

[20] The articles of agreement of those institutions employ as a unit of account dollars of a specified weight and fineness of gold.

the use of either the modern French franc or the free market price of gold would have the effect of introducing an arbitrary and unintended discontinuity into the limitation rate as of April 1, 1978. See page 20, *supra*. And the latter conversion rate is especially unacceptable because it effects a substantial change in the level of the Article 22 limitation that plainly was not contemplated by the Warsaw Convention nations. See pages 19-20, *supra*.

On the other hand, the SDR constitutes a potential alternative choice for implementation of the Convention's limitation on liability. We do not urge the use of the SDR as a conversion mechanism, because it represents a departure from the basis for determining the liability limitation previously applied in United States courts. See also page 14 note 13, *supra*. But it is still highly instructive that the dollar value of the Convention liability limitation arrived at through use of the SDR mechanism proposed by TWA is nearly identical to that yielded by the official price of gold.[21] Indeed, if translated into round figures, as is permitted by Article 22(4) of the Convention, the liability limitation in dollars is essentially the same under either method of calculation. See page 6 note 7, *supra*, page 20 note 18, *supra*, and 82-1186 Pet. 22 n.39.[22]

The court of appeals apparently did not consider the actual dollar liability limits that result from application of the alternative conversion mechanisms to be germane to its analysis. But because the cardinal objective in a case such as this must be to give practical effect to the intention of the contracting nations, it is highly relevant that alternative measures between which the court of appeals deemed itself unable to decide would produce virtually identical judgments. The near identity of the liability limitations

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[21] This identity is particularly significant because the value of the SDR is computed by reference to a weighted basket of major currencies, and it is accordingly relatively stable compared to any single currency over the long run. See page 19 note 17, *supra*.

[22] The court of appeals' belief that use of the SDR-based conversion method suggested by TWA would require it to establish by fiat the number of SDRs to be awarded (see Pet. App. A16) rests on a misunderstanding of TWA's proposal. See page 5 note 5, *supra*.

computed by the alternate routes is also a telling indication that the court of appeals erred in suggesting that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A14). See also page 19 note 17, *supra*.

Conversion of the Warsaw Convention liability limit into dollars at the rate of $42.22 per ounce of gold would effectuate the manifest purpose of the contracting nations: to provide a stable and binding limitation upon the liabilities incurred by international air carriers. The Convention limitation on carriers' liability for loss of, or damage to, cargo thus remains capable of enforcement both in this case and in the future.

CONCLUSION

The judgment of the court of appeals should be affirmed.[23]

Respectfully submitted.

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[23] Although we disagree with the bulk of the court of appeals' reasoning, affirmance is the proper disposition in this case because the judgment of the court of appeals *affirmed* the judgment of the district court, which fixed TWA's liability by reference to the last official price of gold. The court of appeals' declaration that Article 22 is prospectively unenforceable forms no part of its formal judgment. See page 6 & note 8, *supra*. We note that, because the Court granted Franklin Mint's petition, it appears unnecessary to resolve the jurisdictional question mentioned at pages 16-17 of our brief filed at the petition stage.